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No. 89-1491

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

RAYMOND J. HUGHES, JR.,

Petitioner,

v.

JOHN BUSS,

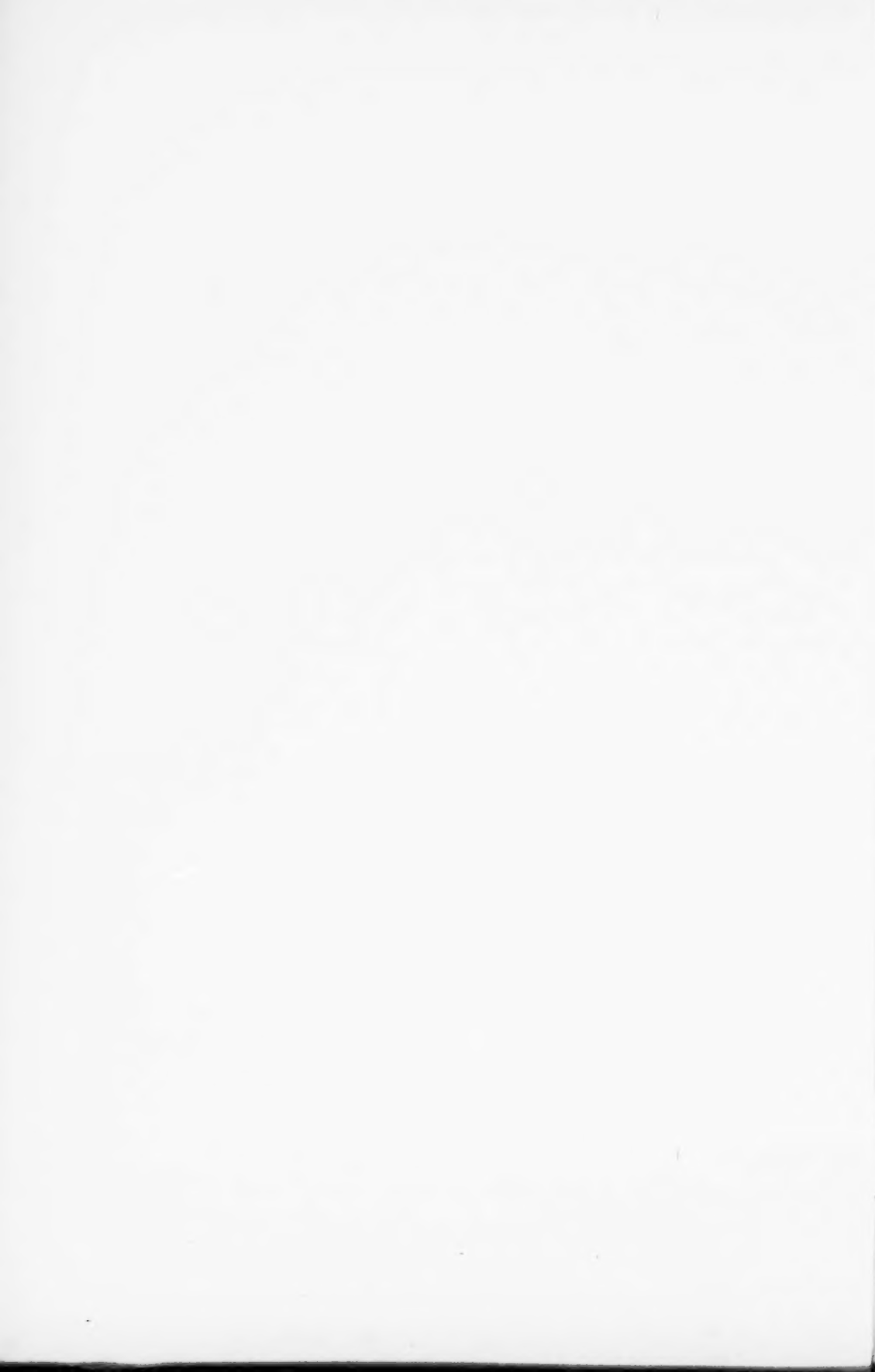
Respondent.

**REPLY BRIEF IN SUPPORT OF
PETITION FOR CERTIORARI**

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ARGUMENT

**I. THE COLOR OF STATE LAW REQUIREMENT
IS AN ELEMENT OF PETITIONER'S
SUBSTANTIVE CLAIM, NOT A PREREQUISITE
TO SUBJECT-MATTER JURISDICTION.**

Respondent Buss seeks to excuse the Seventh Circuit's disregard of the pleadings in this case by stating that the color of state law requirement in sec. 1983 actions is an element of subject-matter jurisdiction, which can be

raised by a court at any time. Respondent's Brief in Opposition, pp. 2-4. Of course, the Court of Appeals did not hold that the color of state law requirement is an element of subject-matter jurisdiction. Appendix to Petition for Writ of Certiorari, pp. A-8 to A-11. Nor did the District Court make any ruling on the question of subject-matter jurisdiction. Appendix, pp. A-24 to A-26. This is a creative, albeit doomed, attempt to justify the decision of the Court of Appeals.

In a federal lawsuit for damages pursuant to 42 U.S.C. Sec. 1983, a plaintiff must prove that the defendant acted under color of state law. That is an element of a plaintiff's claim, and if it cannot be proven, the plaintiff cannot prevail. Color of state law, however, is not a requirement for the federal court's exercise of subject-matter jurisdiction.

Section 1983 actions may be heard in federal court pursuant to the court's federal question jurisdiction. 28 U.S.C. Sec. 1331. Tyler v. Mmes. Pasqua & Toloso, 748 F.2d 283, 285 (5th Cir. 1984). Whether federal question jurisdiction exists is determined from the face of plaintiff's complaint. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1662, 1971-72, 76 L.Ed. 2d 81 (1983).

Long ago it was settled by this Court that "if the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 412, 57 L.E. 716 (1913); Beil v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Petitioner in this case clearly made a substantial federal claim against respondent Buss. The complaint alleges that respondent was employed as a warden by the Wisconsin Department of Natural Resources and was acting under color of state law in his contact with petitioner and his brother. The complaint goes on to allege the basic facts of the incident which resulted in petitioner's arrest; those facts are detailed in the Petition for Writ of Certiorari of March 19, 1990. The complaint alleges for its federal claim that respondent and others "caused the plaintiffs to be arrested without probable cause . . . and subjected them to searches of their bodies and incarceration, thereby causing them to be subjected to a deprivation of their right to be free from such arrest and imprisonment." As has been pointed out before, respondent admitted that his actions were under color of state law.

If the merits of a plaintiff's claim were treated as elements of subject-matter jurisdiction, that would not only defeat the traditional exercise of federal question jurisdiction but it would also effectively deny the plaintiff's right to a jury trial on the merits of his claim. Not surprisingly, this has never been the law; nor should it become the law. Kulick v. Pocono Downs Racing Ass'n, Inc., 816 F.2d 895, 898 (3rd Cir. 1987) ("Otherwise the district court could turn an attack on the merits, against which the party has the procedural protections of a full trial including the right to a jury, into an attack on jurisdiction, which a court may resolve at any time without a jury . . .").

The Court should realize that the respondent's interpretation of the Seventh Circuit's decision is at odds

with prior decisions of this Court, other circuits, and the Seventh Circuit itself. Kohler Die & Specialty, supra; Green v. Ferrell, 664 F.2d 1292, 1294, (5th Cir. 1982); Junior Chamber of Commerce of Rochester v. U.S. Jaycees, 495 F.2d 883, 886 (10th Cir. 1974); Malak v. Assoc. Physicians, Inc., 784 F.2d 277, 279-80 (7th Cir. 1986).

Respondent cites three cases in support of his novel proposition. There is some question, however, in each of those cases whether the color of state law requirement was in fact being treated as a requisite for subject-matter jurisdiction.¹ The criticism of Wright and Miller is apt:

In several recent cases dismissal has been for want of federal question jurisdiction in suits against private institutions for alleged denials of constitutional rights, where it was found that the institution was not so entwined with the state that its action could be regarded as "state action" to make the Constitution applicable But . . . it would seem that a non-frivolous claim that the institution has the requisite relation to the state is sufficient to establish jurisdiction. If that contention is found to be unsound,

¹

Those cases may have been referring to the color of law requirement in 28 U.S.C. Sec. 1343 (3), the jurisdictional statute for certain civil rights claims which could not meet the amount-in-controversy requirement of 28 U.S.C. Sec. 1331 prior to 1980.

dismissal should be for failure to state a claim on which relief can be granted rather than for want of jurisdiction.

Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d, Sec. 3564 n.13 (citations omitted).

II. THE FACTUAL NATURE OF THE COLOR OF STATE LAW DETERMINATION UNDERLINES THE UNFAIRNESS OF THE COURT OF APPEALS DECISION.

Respondent seeks to diminish the importance of this case by arguing that it presents "essentially a factual dispute." Respondent is partially correct.

The color of state law issue is one which turns on matter of fact. Because this is true, it underscores the unfairness of the Court of Appeals decision. What the Court of Appeals did, after all, was to decide an essentially factual matter, without notice or opportunity to the parties to be heard, contrary to the way the issue had been settled by the pleadings. Not only that, but because the color of law issue had been settled by the pleadings, petitioner did not devote much energy to the issue in the discovery process. Petitioner would have been handicapped in responding to the issue for the first time on appeal even if he had had a chance to be heard.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that the Court grant the petition for certiorari.

Dated this _____ day of _____, 1990.

Respectfully submitted:

By: _____

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